

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of  
Protecting and Promoting the Open Internet

)  
)  
)  
)  
)  
)

GN Docket 14-28

COMMENTS OF ALEXANDER ZAJAC

Alexander Zajac  
4465 MacArthur Blvd NW  
Apt 210  
Washington, DC 20007

*Concerned Citizen*

June 4, 2014

There has been extensive discussion in the past months over the protection of the open internet, often termed “net neutrality.” Over 45,000 filings have been made with FCC in the last 30 days over this proposal, and it is crucial that the FCC read and take this large number of comments into consideration when considering current telecommunications regulations for the internet. Within these filings, however, are letters submitted by AT&T, Comcast, and Verizon, three interested parties who are some of the largest proponents of limiting the scope of the FCC's open internet regulations. Their comments, however, shed light on the misinformation propagated by these corporations and, properly understood, demonstrate precisely why the FCC must step in now and use the regulatory power entrusted to it in order to protect the existence of a free and open internet.

In AT&T's letter to the FCC dated March 21, 2014, the following policy position is outlined:

In short, the Commission should follow the court's directive and permit ISPs 'to make individualized decisions, in particular cases, whether and on what terms to deal' with edge providers [citation omitted], without any common-carrier-like constraints on the outcomes of those dealings. At the same time, the Commission can prohibit *commercially unreasonable* [emphasis original] conduct that deters investment in advanced telecommunications capability by stifling the openness of the Internet .<sup>1</sup>

This policy outline, however, suffers from two great flaws. Firstly, the definition of “commercially unreasonable” is vague and unclear, and this would allow ISPs to contrive reasons for harmful and innovation-stifling conduct and dealings which could avoid designation as “commercially unreasonable.” Furthermore, the category of “commercially unreasonable” would rapidly become problematic in a judicial sense as judges would be free to construe this

---

<sup>1</sup> *Comments of AT&T Services, Inc., In the Matter of Protecting and Promoting the Open Internet, Before the Federal Communications Commission*, GN Docket 14-28 (2014) (statement of Christopher M. Heimann, Gary L. Phillips, and Lori Fink, Counsel for AT&T Inc.), 1.

designation as they wish, leading to a wide variety of outcomes in cases and a lack of uniformity, which is inimical both to innovation and a proper standard of justice. Secondly, this policy does not protect innovation, as AT&T claims. If one accepts “the goal of a free and open Internet that catalyzes innovation and investment,” as AT&T claims to do,<sup>2</sup> then it is clear that forcing innovators and smaller competitors on the web to fight ISPs in court under the “commercially unreasonable” standard effectively kills innovation and investment since court cases require a significant investment of time and money, which larger and more established corporations have in greater quantity than smaller start-ups.

Nevertheless, AT&T continues to claim that “allowing individualized negotiations in the mine run of cases would promote many of the same goals that the net neutrality rules are designed to further.”<sup>3</sup> AT&T argues,

For example, broad net neutrality rules are often justified as necessary to protect fledgling edge providers and those who seek to bring innovative new applications to market. But permitting individualized arrangements with ISPs often would benefit smaller, innovative edge providers by enabling them to overcome more established players’ large capital investments in physical infrastructure.<sup>4</sup>

However, as this letter just noted, negotiations with ISPs which reach an impasse can only be settled by long, expensive lawsuits, as AT&T’s own letter suggests. The costs of these lawsuits would effectively deter and eliminate edge providers. Individualized arrangements would indeed permit a startup video streaming service to negotiate with AT&T, Verizon, and Comcast, for example, but it would also permit these cable companies to either directly refuse an individualized arrangement or charge unreasonable rates in the interest of protecting established players, such as Netflix. It is this latter situation that is much more likely; cable companies are

---

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 2.

<sup>4</sup> Ibid.

more likely to protect established players precisely because of their “large capital investments” and the lucrative deals they offer to cable companies over the limited resources of edge providers. Despite AT&T's continued repetition that “[b]y enabling smaller edge providers to negotiate special arrangements for the handling of their traffic, flexible net neutrality rules will empower start-ups to compete more effectively against more entrenched and well-heeled rivals,”<sup>5</sup> it is the entrenched rivals who will have greater bargaining power and emerge with a greater advantage over start-up competitors.

AT&T's attempts to further this line of argumentation similarly fail under closer scrutiny. Later in their letter, AT&T claims,

Platform owners such as broadband ISPs have no reason to inefficiently discriminate against new and innovative products and services [citation omitted]. Indeed, ISPs' incentives actually run in the opposite direction. By supporting innovation on their platforms, broadband providers make those platforms more valuable to end users in the long run, enabling ISPs to reap far greater economic benefits over time. In particular, a platform provider free from retail price regulation—as all broadband providers are today—will normally have incentives to deal evenhandedly with independent providers of complementary applications, because anti-consumer discrimination in the applications market would simply devalue the platform and would not enable the provider to earn any profits it could not otherwise earn for the underlying platform itself [citation omitted].<sup>6</sup>

This entire argument, however, hinges on at least one of the following premises: (1) that ISPs face competition which allows consumers to switch to a more competitive ISP with a relatively low transaction cost or (2) that consumers will purchase cheaper plans from ISPs if faced with costs they find incommensurate with the quality of service they receive. Both of these premises are blatantly contradicted by the reality of the market at present. Firstly, ISPs do not face competition; a recent study found that “only nine percent of Americans have access to three or

---

<sup>5</sup> Ibid., 15.

<sup>6</sup> Ibid., 16-17.

more providers; the majority are limited to one or two incumbent telephone or cable companies.”<sup>7</sup> Secondly, internet access is a near necessity in the current era; in fact, a German court recently ruled that the internet is “essential,” stating, “The Internet plays a very important role today and affects the private life of an individual in very decisive ways. Therefore loss of use of the Internet is comparable to the loss of use of a car.”<sup>8</sup> Therefore, it is an unlikely scenario and is forcing an undue burden on citizens to expect them to drastically reduce or discontinue altogether their internet service in order to force ISPs to change content access. AT&T defends its false argument with appeal to authority

(As Nobel Prize-winning economist Gary Becker and Dennis Carlton have explained, “discrimination by broadband access providers that limits access to content usually reduces the amount that consumers are willing to pay for broadband access services. That is, consumers are willing to pay more for access to more content and, as a result, broadband access providers face disincentives for restricting access to Internet content [citation omitted].”),<sup>9</sup>

with undefended assumptions regarding the ISP market

(In fact, that incentive to maximize available content would exist even if the broadband market were *uncompetitive* [emphasis original] as a general matter.),<sup>10</sup>

and with false alternatives which consumers do not actually experience

(As it is, however, any broadband access provider that prevents innovative new content and applications from using its platform would inflict considerable harm on itself given that most consumers could switch to a different provider that does not engage in such self-defeating behavior [citation omitted].).<sup>11</sup>

AT&T nevertheless insists that the protection of start-ups is a “conceptually flawed and

---

7 Hibah Hussain, Danielle Kehl, Patrick Lucey, and Nick Russo, *The Cost of Connectivity 2013: A Comparison of High-speed Internet Prices in 24 Cities around the World* (Washington, DC: New America Foundation, 2013), 9.

8 “German Court Rules Internet ‘Essential,’” *Reuters*, January 24, 2013, <http://www.reuters.com/article/2013/01/24/us-germany-internet-idUSBRE90N15H20130124>.

9 *Comments of AT&T*, 17.

10 *Ibid.*

11 *Ibid.*

factually specious” argument.<sup>12</sup> It is important that “the Commission’s focus [] be on promoting innovation in the Internet ecosystem as a whole and not on shielding individual competitors *per se* [emphasis original],” according to AT&T.<sup>13</sup> Indeed, AT&T claims, “In no other area of the economy does the government *ban* [emphasis original] voluntary market transactions (here, for example, quality-of-service enhancements) specifically in order to prevent those with superior resources from offering better services to their own customers.”<sup>14</sup> This statement is factually false, however. An excellent counter-example is that of electricity:

Since the 1930s electricity has been treated by policy-makers as a public good. The framework for its production and delivery was developed to ensure that it is available to all. And that it is affordable, reliable and available at a price that is reasonably stable and predictable. Because there was doubt that an open market place would achieve these objectives, public policy chose a regulated monopoly framework. There was, by the way, clear evidence in the early decades of this century that an open market would not achieve these objectives.<sup>15</sup>

Water is another example, as water must be provided equally and fairly across service areas.<sup>16</sup> In a footnote, AT&T adds, “[A]s Professors Farber and Katz have put it: ‘No one would propose that the U.S. Postal Service be prohibited from [charging more for] Express Mail because a “fast lane” mail service is “undemocratic.” Yet some current proposals would do exactly this for Internet services [citation omitted].’”<sup>17</sup> However, this analogy works against AT&T’s own argument. Yes, USPS offers both a “slow” and a “fast” lane for mail service, nevertheless, *both* of these services are available to *everyone* without discrimination, and not based on individualized vertical arrangements. Therefore, the USPS example is a third example in favor of

---

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., 18.

<sup>15</sup> Sharon L. Nelson, “Competition in Electricity: Transition from Almost a Public Good to Almost a Commercial Commodity” (lecture, Boeing Company, Olympia, WA, April 22, 1997).

<sup>16</sup> See, for example, Pennsylvania Public Utility Commission, *Responsible Utility Consumer Protection Act* (Harrisburg, PA: Pennsylvania Public Utility Commission, 2013).

<sup>17</sup> *Comments of AT&T*, 18.

the supporters of the open internet. By no means is it reasonable for AT&T to assert that “the theoretical basis of this rationale for a strict nondiscrimination rule is thoroughly unsound and anathema to a market economy.”<sup>18</sup>

AT&T, however, still asserts,

Indeed, allowing broad room for individualized dealings between ISPs and edge providers likely will help small edge providers in the majority of cases. To understand why that is so, it is important to recognize that the Internet is not now, and has never been, a 'neutral' place where different edge providers compete on an equal playing field. Quite to the contrary, the largest edge providers—including but not limited to content “hyper giants” such as Google and Facebook [citation omitted]—already use their economic power to provide services to their customers that place them at a distinct advantage vis-à-vis smaller providers. . . . The poster child for expansive net neutrality rules is the small entrepreneur working in a garage or low-rent office space. But that entrepreneur’s larger and richer rivals already can and do use their economic power to advantage themselves in ways that broad net neutrality rules aimed at ISPs do nothing to address. In fact, many of today’s leading edge providers have themselves evolved into 'global delivery networks' with an unprecedented combination of transmission capacity, processing power, and data storage [citation omitted]. These networks represent enormous capital investments that already allow certain edge providers to serve their customers more effectively and at faster speeds than rivals lacking such resources.<sup>19</sup>

What AT&T continually misses in their entire argument, however, is that removing net neutrality is far more likely to aggravate this problem than to alleviate it. For example, AT&T validly states, “Simply put, innovators working out of a garage cannot afford to put servers in every wire center, like Netflix can.”<sup>20</sup> Yet, this is an interesting example, especially considering that Comcast reached an agreement with Netflix regarding download speeds,<sup>21</sup> and Google may attempting to be doing the same with Verizon.<sup>22</sup> Small innovators often cannot even get their foot

---

18 Ibid.

19 Ibid., 18-19.

20 Ibid., 21.

21 Edward Wyatt and Noam Cohen, “Comcast and Netflix Reach Deal on Service,” *New York Times*, February 23, 2014, <http://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html>.

22 Ryan Singel, “Google, Verizon Deny Net Fast-Lane Deal, but *Times* Says It's True,” *Wired*, August 5, 2010,

in the door to negotiate with massive cable corporations, and even so cable corporations are much more willing and open to negotiate with the “hyper giants” precisely because of their “economic power.” It is interesting that AT&T claims it and other cable companies will be above the influence of this economic power when they fully admit that it influences all other aspects of transmission and delivery of services.

AT&T also overstates the methods by which start-ups such as Google and Facebook defeated more established players. Google's creators defeated the myriad of other search engines, including Yahoo!, Excite and Lycos, Netscape's Netcenter, AOL.com, MSN.com, and even Disney's Go.com, which were all favored by investors in the late 1990s, by simply creating a better search algorithm and being able to be faster by creating a more streamlined website.<sup>23</sup> As early as 1998, Scott Rosenberg saw the potential in Google's sleeker layout: “The irony here is that the big portal sites are the ones, increasingly, making it *harder* [emphasis original] to use the Web: They're under such pressure to turn a profit to justify their market valuations that their pages have become crowded, blinking arrays of commercial distractions.”<sup>24</sup> If, however, those established providers like Yahoo! had been able to secure individualized arrangements with ISPs at the time to deliver their flashier and more crowded homepages at faster speeds, Google would have lost the advantage from its simplicity and may not have been able to unseat all the major players at the time. Mark Zuckerberg used some of the same tactics in developing Facebook and ultimately defeating MySpace:

Facebook, meanwhile, opted for a cleaner, Google-like interface that resonated with a broader audience. The design was predominantly blue and white, and the company rolled out features piecemeal: email, instant messaging and then live

---

<http://www.wired.com/2010/08/google-verizon-deny-deal/>.

23 Scott Rosenberg, “Let's Get This Straight: Yes, There Is a Better Search Engine,” *Salon*, December 21, 1998, [http://www.salon.com/1998/12/21/straight\\_44/](http://www.salon.com/1998/12/21/straight_44/).

24 Ibid.

feeds of their activities. The platform was unadorned, intuitive, structured to reflect how people were already communicating online – and in contrast to MySpace’s anything-goes approach, it was soothingly Spartan.<sup>25</sup>

AT&T's assertion that “[f]or example, in 2002, when it was still a relative newcomer competing with entrenched rivals, Google paid for prime placement of its search service on various ISPs’ portals, including AOL’s [citation omitted]” and that “[o]ther applications seeking to unseat established competitors have pursued similar strategies [citation omitted],”<sup>26</sup> only tells a very limited side of the full story and deliberately ignores the major role the openness of the internet played in allowing start-ups like Google and Facebook to emerge on top.

AT&T argues, however, that it will not be offering a fast lane for data and “a winding dirt road” for everyone else; instead, AT&T claims,

Indeed, if Broadband Provider X began degrading its best-effort Internet access platform to favor its “prioritized” content, such that most applications and content loaded more slowly on X’s network than on its rivals’ Internet access platforms, customers would begin switching to those rivals en masse. The rivals would encourage consumers to do precisely that by running advertisements emphasizing the poor performance on Broadband Provider X’s network. For that matter, application and content providers themselves would likewise be free to broadcast their preference for X’s rivals right on their homepages for all traffic bound for X’s current customers. In short, there is nothing to this concern.<sup>27</sup>

Aside from once again overstating the ability of American consumers to actually choose between ISPs, AT&T is ignoring the basic principle of math. If a network has a bandwidth of 2GB per second, and a premium service pays for a dedicated portion of that bandwidth, then all remaining web traffic *must of necessity* be confined to a smaller bandwidth. It is an irrelevant red herring for AT&T to emphasize that “[b]roadband providers—including both cable providers and ILECs, as well as new entrants such as Google Fiber—are in fact investing tens of billions of dollars to

25 Kevin Kelleher, “How Facebook Learned from MySpace's Mistakes,” *Fortune*, November 19, 2010, <http://fortune.com/2010/11/19/how-facebook-learned-from-myspaces-mistakes/>.

26 *Comments of AT&T*, 21-22.

27 *Ibid.*, 26-27.

increase Internet access speeds, including by deploying next-generation technologies specifically in order to gain a leg up on rivals [citation omitted].”<sup>28</sup> No matter what the total bandwidth is, if a portion of it is dedicated to a premium service, the remainder must of necessity be smaller than the total was previously. It is rather surprising that AT&T tries to dismiss this bandwidth argument grounded in the indisputable principles of math.

Another claim of AT&T is that “[e]mpirical studies in a variety of contexts have shown that vertical arrangements are much more likely to promote competition than hinder it.”<sup>29</sup> There is, however, no empirical study cited to back this claim. Moreover, a report of the Organisation for Economic Co-operation and Development explains,

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements** [emphasis original], is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. . . .

**Vertical agreements** [emphasis original] try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. *Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements* [emphasis added].<sup>30</sup>

In short, the competitive effects of vertical agreements are very complicated and so the regulation of these agreements must be tailored to specific markets and industries. Therefore, AT&T's claim, which hinges on the assumption that the asserted positive effects of vertical agreements in certain industries can be extrapolated to the telecommunications industry, is

---

28 Ibid., 26.

29 Ibid., 2.

30 Organisation for Economic Co-operation and Development Regulatory Reform Programme, *Hungary: Background Report on The Role of Competition Policy in Regulatory Reform* (1999), 9.

incorrect. Moreover, in light of the success of the open internet model, which has been the norm until now and has resulted in countless innovations and fierce competition, it is not wise to begin to allow vertical agreements since proper regulation of them is complex and likely to take time (probably years) to develop.

AT&T further contends that “in the Internet space, allowing ISPs to recover some of their network costs directly from edge providers would benefit consumers by decreasing the cost of broadband service. And this, in turn, would increase the demand for broadband Internet access, spurring ISPs to deploy more and faster broadband infrastructure.”<sup>31</sup> However, this would be a more plausible position to hold if, in the United States, broadband did not cost “nearly three times as much as in the UK and France, and more than five times as much as in South Korea.”<sup>32</sup> In fact, according to a study by the New America Foundation, “The new data underscores the extent to which U.S. cities lag behind cities around the world, further emphasizing the need for policy reform. Rather than allowing American cities to fall behind, policymakers should reassess current approaches and implement strategies to increase competition, in turn fostering faster speeds and more affordable access.”<sup>33</sup> In addition, the report demonstrates how to actually decrease prices and increase speeds for consumers:

Our data also shows that the most affordable and fast connections are available in markets where consumers can choose between at least three competitive service providers. This trend is consistent with last year’s data, and also underscores the critical role that competition plays in determining broadband prices and speeds. According to the 2010 National Broadband Plan, only nine percent of Americans have access to three or more providers; the majority are limited to one or two incumbent telephone or cable companies [citation omitted].<sup>34</sup>

---

31 *Comments of AT&T*, 2.

32 Tom Geoghegan, “Why is broadband more expensive in the US?” *BBC News*, October 27, 2013, <http://www.bbc.com/news/magazine-24528383>.

33 Hussain et al., *The Cost of Connectivity 2013*, 2.

34 *Ibid.*, 9.

The clear problem in the United States is monopolization, and it is no surprise that monopolistic cable corporations like AT&T would recommend vertical agreements as the way to decrease costs and increase speeds instead of the more obvious and more effective regulation and perhaps even breaking up of existing telecommunications conglomerates and monopolies. AT&T's claims, such as that

by enabling ISPs to recover the costs of network upgrades not just from consumers but also from the edge providers whose applications benefit from such upgrades, flexible rules also will promote deployment of additional broadband infrastructure and improved features[ and] will reduce the cost of broadband service for consumers, facilitating greater adoption,<sup>35</sup>

are rather dishonest given that Americans should already be paying less and experiencing greater connection speeds than in the status quo. Given the monopolistic tendencies of current cable companies, the claim made by AT&T further in its letter is almost laughable:

Today, for example, many broadband providers recover essentially all of the costs of residential access networks from fees imposed on the subscribers to those networks. But this traditional cost-recovery model will become increasingly unsustainable as networks continue investing billions to accommodate the network demands imposed by bandwidth-intensive applications that are used extensively by only limited subsets of subscribers.<sup>36</sup>

The worldwide data show that cable companies in the United States are not charging too little, offering too much service, or even experiencing a shortage of willing consumers. AT&T continues to insist the FCC allow “the free play of market forces”<sup>37</sup> to dictate internet policies when market forces are already rapidly disintegrating in the increasingly monopolistic marketplace of ISPs in the United States.

It is further absurd that AT&T expresses concern about open internet regulations which

---

<sup>35</sup> *Comments of AT&T*, 15-16.

<sup>36</sup> *Ibid.*, 23.

<sup>37</sup> *Ibid.*

would “hurt those consumers who are low-income or who simply would prefer to pay low rates for basic broadband connectivity and do not wish to use quality-of-service-needy, bandwidth-intensive applications in the first place. And as prices for broadband service go up, adoption of broadband services will fall.”<sup>38</sup> Firstly, AT&T again ignores the past twenty years of internet history. In the last twenty years, all of which were dominated by the open internet model, the following were true: (1) in 2000, 37% of Americans had access to the internet (34% via dial-up and 3% via broadband) while in 2013, 73% of Americans had access (70% via broadband and 3% via dial-up);<sup>39</sup> (2) as of 2010, basic broadband cost an average of \$39.01 per month while the average dial-up user pays \$29;<sup>40</sup> and (3) of the 21% of Americans who did not use the internet, 48% “cite issues relating to the relevance of online content as the main reason they do not go online.”<sup>41</sup> These facts demonstrate that (1) the customer base for the internet grew rapidly under the open internet model and is highly unlikely to reverse and fall, as AT&T claims; (2) the money saved by families that purchase lower quality services like dial-up is not dramatically high like AT&T claims; and (3) the open internet model has not shut out the poor, as those who do not use the internet in the status quo do so because of relevance perception rather than economic considerations. Secondly, AT&T again ignores the true cause of high prices and lower quality service; breaking the monopolies of cable companies and offering Americans greater choice between ISPs and not permitting individualized arrangements will truly help the poor gain access to the internet.

These facts also counter AT&T's claims that “by spurring innovation and reducing consumer prices in the manner described above, individualized arrangements naturally raise the

---

38 Ibid.

39 Kathryn Zickuhr and Aaron Smith, *Home Broadband 2013* (Washington, DC: Pew Research Center, 2013), 2.

40 Aaron Smith, *Home Broadband 2010* (Washington, DC: Pew Research Center, 2010), 9-10.

41 Ibid., 3.

demand for broadband services, thus making network expansion more attractive [citation omitted].”<sup>42</sup> Again, of the 21% of non-internet-using Americans as of 2010, only “one in ten non-users say would like to start using the internet in the future.”<sup>43</sup> This supposed massive expansion of broadband which AT&T claims will happen is simply not going to happen. From 2010 to 2013, the amount of broadband users in the United States only rose from 66% of the population to 70% of the population (and the total number of internet users only rose from 71% to 73%).<sup>44</sup> The market for internet users has largely been saturated and has stagnated in growth in the last three to four years. And, given that few non-users are even *interested* in becoming internet users, AT&T's claim of rapid expansion of the customer base is baseless.

The final benefits AT&T claims with respect to individualized arrangements are that

[p]ermitting individualized deals also would promote the development of cutting-edge network features (and with them, innovative applications that use those features) because ISPs could recover the costs of such network upgrades directly from the edge providers that make use of them. Finally, such rules also would enable ISPs and edge providers to efficiently determine which innovative new applications require quality-of-service enhancements that only ISPs can deliver.<sup>45</sup>

Nevertheless, as AT&T cannot give a single example of “cutting-edge network features” or of “quality-of-service [QoS] enhancements” which have been stifled due to lack of vertical arrangements, this argument is, at best, merely weak speculation. Moreover, even granting AT&T the existence of these QoS enhancements, their argument continues to be flawed. AT&T claims,

If a particular level of prioritization could be had simply by demanding it from the ISP, then—under a familiar tragedy-of-the-commons dynamic—every user would demand high priority, with the consequence that no packets would receive any meaningful priority. *Price signals provide the only feasible means of efficiently identifying high value, latency-sensitive products that need to be prioritized in order to realize their full worth for consumers* [emphasis added]. And as AT&T

---

42 *Comments of AT&T*, 24.

43 Smith, *Home Broadband 2010*, 3.

44 Zickuhr and Smith, *Home Broadband 2013*, 2.

45 *Comments of AT&T*, 2.

has explained in prior comments [citation omitted], the most efficient and only workable solution may be to charge the providers of performance-sensitive, high-bandwidth applications themselves, who are the parties that will know the most about the particular QoS needs of their individual applications and which network techniques are best suited to meet those needs.<sup>46</sup>

AT&T is incorrect that price signals are the only feasible means to identify products which need priority from an ISP. In fact, price signals will follow companies and websites with the most money, *not* the companies and websites with the most need. Not only could ISPs overcharge in order to shut out start-ups, but existing giants such as Google and Facebook could even offer ISPs a greater price for priority than the market has set in order to distort price signals and effectively disadvantage start-ups about which they are concerned. In both cases, price signals are distorted rather than functioning as a “feasible means of efficiently identifying” the products that need priority. Again, given the monopolistic nature of the cable and internet industry at present, it is virtually guaranteed that price signals will become distorted and not serve their original purpose.

In light of these weak and unsubstantiated arguments, it is amusing that AT&T advises that “the Commission should ground [new rules] in facts, not speculation, and common sense reality, not rhetoric.”<sup>47</sup> In addition, later in the letter, AT&T references *United States v. Southwestern Cable Co.* and notes,

*Southwestern Cable* involved, among other things, a Commission requirement that CATV systems transmit to their subscribers the signals of any station into whose service area the CATV system had brought a competing broadcast signal. *Id.* at 166. That targeted requirement was among a number of rules the Commission had adopted out of fear that the carrying of distant broadcast signals by CATV operators would imperil local broadcasters. *Id.* at 175. As the Supreme Court explained in *Midwest Video II*, the carriage requirement at issue in *Southwestern Cable*, unlike that in *Midwest Video II* itself, “did not amount to a

---

<sup>46</sup> *Ibid.*, 25.

<sup>47</sup> *Ibid.*, 3.

duty to hold out facilities indifferently,” but was rather “limited to remedying a specific perceived evil”—namely, the perceived threat to local broadcasters—and therefore did not run afoul of the prohibition on treating cable system providers as common carriers [citation omitted].<sup>48</sup>

Hence, AT&T here acknowledges a valid regulation of cable companies based on a perceived though not yet actualized threat that the FCC recognized. This is in direct contradiction to the statement five pages earlier in the letter in which AT&T claims rules should be grounded in “facts, not speculation,” presumably ruling out perceived threats that have not actualized. This is simply another example of the poor argumentation exhibited throughout AT&T's letter.

AT&T further argues,

It is also important that any new rules balance the need for flexibility in addressing particular actions with the benefits of regulatory certainty. As the Commission has long recognized, regulatory uncertainty is the enemy of investment and thus is antithetical to the broadband deployment objectives of section 706 [citation omitted]. Accordingly, the more clarity and guidance the Commission provides in advance, the better.<sup>49</sup>

Yet, AT&T fails to recognize that uniform classification of ISPs as common carriers would present the least amount of regulatory uncertainty. In fact, AT&T introduces a blatant contradiction when arguing for regulatory certainty:

Accordingly, the more clarity and guidance the Commission provides in advance, the better. To that end, the Commission should establish a safe harbor for non-exclusive arrangements entered into with unaffiliated providers of Internet content, services, or applications. ISPs have neither the incentive nor ability to harm Internet openness in derogation of section 706 goals in these circumstances, and *subjecting them to case- by-case regulatory scrutiny would unnecessarily impede efficient and pro-consumer arms-length commercial dealings* [emphasis added]. For arrangements that do not fall within that safe harbor, *the Commission should employ a case-by-case analysis* [emphasis added] that examines the competitive effects, if any, of the arrangement, as well as other factors similar to those contained in the *Data Roaming Order*.<sup>50</sup>

---

48 Ibid., 8.

49 Ibid.

50 Ibid., 3.

Essentially, AT&T argues that case-by-case regulation is inefficient and then proceeds to recommend case-by-case regulation as a norm. Meanwhile, AT&T again ignores the obvious, i.e., that uniform regulation of ISPs as common carriers is both an efficient and certain regulatory scheme. As AT&T attempts to argue further in the letter,

When a provider is choosing whether to deploy new facilities or services, it needs to be able to make an accurate judgment regarding what the regulations allow, so that it can weigh the expected costs and benefits of its investment. Where a regulation is potentially overbroad and enforcement risks are difficult to calculate, a prudent provider will, on the margins, be less likely to invest, undermining the very goal section 706 seeks to advance [citation omitted].<sup>51</sup>

Once again, the certainty and predictability of regulating ISPs as common carriers is lost on AT&T. Broad regulations do not necessarily impose enforcement risks that are “difficult to calculate,” though AT&T conflates the two in its letter.

AT&T still maintains that broad regulation would be antithetical to “modern antitrust doctrine and [to] basic regulatory best practices, which recognize that regulations always introduce competitive distortions and unintended consequences, and which therefore limit government intervention to situations in which private arrangements inflict identifiable harm.”<sup>52</sup> What is interesting, however, is the claim that the protection of the open internet will introduce “distortions and unintended consequences.” The internet has been open for approximately two decades now, and it is dishonest of AT&T to assert that protection of the status quo will somehow produce distortions and unintended consequences despite already having been in existence for two decades. In fact, it is the allowing of individualized arrangements which will cause distortions and unintended consequences, since there is no way to predict what these new and

---

<sup>51</sup> Ibid., 12-13.

<sup>52</sup> Ibid., 4.

previously unused arrangements will do for the broadband market and the internet as a whole.

In explaining how antitrust doctrine is instructive, AT&T says,

For example, even conduct by a monopolist is not condemned by the antitrust laws unless it “harm[s] the competitive *process*,” not merely “one or more *competitors*,” *and* the conduct has a demonstrated “anticompetitive effect [emphases original; citation omitted].” Similarly, antitrust law has moved away from per se rules in all but a handful of very narrow circumstances [citation omitted]. Per se rules, like broad net neutrality rules, presume that certain conduct is harmful as a matter of law. Those rules are now reserved for a narrow range of situations that are rarely if ever procompetitive (for example, horizontal price fixing) [citation omitted].<sup>53</sup>

Firstly, AT&T fails to explain why individualized arrangements with ISPs do *not* harm the “competitive process.” In fact, as the stories of Google and Facebook demonstrate, the mere knowledge that all content on the web is treated equally helps spur the construction of companies whose audience is nearly everyone. If Larry Page and Sergey Brin had known that Yahoo! and AOL.com had access to or had reached arrangements with the major ISPs of the time, they may not have tried to expand the scope of Google beyond Stanford, knowing that it would have required a much steeper initial investment, perhaps one that was too steep altogether. Secondly, AT&T fails to explain why individualized arrangements with ISPs might *not* be classified with horizontal price fixing, which is “rarely if ever procompetitive.” On the contrary, AT&T simply asserts, “[V]ertical arrangements—like those between ISPs and edge providers—are overwhelmingly likely to be procompetitive, especially where the parties lack any theoretical incentive to act anti-competitively.”<sup>54</sup> However, this letter has repeatedly explained why there are incentives for ISPs to act in anti-competitive manners, all of which reasons are ignored by AT&T.

Moreover, AT&T cites the FTC:

---

<sup>53</sup> Ibid., 29.

<sup>54</sup> Ibid.

As the FTC has warned about regulation of broadband Internet access services: Policy makers also should carefully consider the potentially adverse and unintended effects of regulation in the area of broadband Internet access before enacting any such regulation. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation.<sup>55</sup>

Again, AT&T conveniently ignores the past twenty years of experience in which open internet has been the norm. This is not a new regulation likely to have “potentially adverse and unintended consequences,” but rather an enshrining of what has been the norm as an official rule. Indeed, the allowance of vertical arrangements would be a new change in policy which is likely to have “potentially adverse and unintended consequences.” AT&T should be more careful to accurately apply general regulatory principles to the current issue at hand while considering their context in the history of internet technology. It is disingenuous to accuse a policy of open internet of being “welfare-reducing in the long term, particularly in terms of product and service innovation” when it has been in existence for twenty years.

When trying to explain the areas in which FCC regulations should apply, AT&T states, “The most important such factor should be whether the action would have anticompetitive effect —i.e., whether it poses a threat to Internet openness by foreclosing competition among providers of lawful content, applications and services over the Internet.”<sup>56</sup> AT&T, though, fails to offer one concrete example of a vertical arrangement which would *not* have an anticompetitive effect, whether they be arrangements within AT&T's proposed safe harbor, which covers “situations in which an ISP is neither favoring its own content, applications, or services nor providing a service

---

<sup>55</sup> Ibid., 30.

<sup>56</sup> Ibid., 13.

on an exclusive basis,”<sup>57</sup> or those situations “that fall outside of the safe harbor but benefit consumers, promote openness, and incentivize broadband investment.”<sup>58</sup> AT&T recognizes, for example, that Comcast's favoring of its own Xfinity streaming services over Netflix would not be lawful. However, in accelerating *any* content, that content is given an advantage over any other competing content, especially in light of a 2012 study by Google which found that “[p]eople will visit a Web site less often if it is slower than a close competitor by more than 250 milliseconds.”<sup>59</sup> Any variability in speeds inherently distorts the playing field in today's age of rapid download speeds, and thus, by AT&T's own criterion, there are no acceptable vertical agreements.

There are thus no grounds to AT&T's argumentation regarding allowing vertical individualized arrangements, and the arguments for the protection of an open internet remain sound. The FCC should act to reclassify broadband service and to continue to protect the open internet by all means possible.

---

57 Ibid., 12.

58 Ibid., 13.

59 Steve Lohr, “For Impatient Web Users, an Eye Blink Is Just Too Long to Wait,” *New York Times*, February 29, 2012, <http://www.nytimes.com/2012/03/01/technology/impatient-web-users-flee-slow-loading-sites.html>.

## Bibliography

- Comments of AT&T Services, Inc., In the Matter of Protecting and Promoting the Open Internet , Before the Federal Communications Commission*, GN Docket 14-28, 2014. Statement of Christopher M. Heimann, Gary L. Phillips, and Lori Fink, Counsel for AT&T Inc.
- Geoghegan, Tom. “Why is broadband more expensive in the US?” *BBC News*, October 27, 2013. <http://www.bbc.com/news/magazine-24528383>.
- “German Court Rules Internet 'Essential.'” *Reuters*, January 24, 2013. <http://www.reuters.com/article/2013/01/24/us-germany-internet-idUSBRE90N15H20130124>.
- Hussain, Hibah, Danielle Kehl, Patrick Lucey, and Nick Russo. *The Cost of Connectivity 2013: A Comparison of High-speed Internet Prices in 24 Cities around the World*. Washington, DC: New America Foundation, 2013.
- Kelleher, Kevin. “How Facebook Learned from MySpace's Mistakes.” *Fortune*, November 19, 2010. <http://fortune.com/2010/11/19/how-facebook-learned-from-myspaces-mistakes/>.
- Lohr, Steve. “For Impatient Web Users, an Eye Blink Is Just Too Long to Wait.” *New York Times*, February 29, 2012. <http://www.nytimes.com/2012/03/01/technology/impatient-web-users-flee-slow-loading-sites.html>.
- Nelson, Sharon L. “Competition in Electricity: Transition from Almost a Public Good to Almost a Commercial Commodity.” Lecture presented at Boeing Company in Olympia, WA on April 22, 1997.
- Organisation for Economic Co-operation and Development Regulatory Reform Programme. *Hungary: Background Report on The Role of Competition Policy in Regulatory Reform*,

1999.

Pennsylvania Public Utility Commission. *Responsible Utility Consumer Protection Act*.

Harrisburg, PA: Pennsylvania Public Utility Commission, 2013.

Rosenberg, Scott. "Let's Get This Straight: Yes, There Is a Better Search Engine." *Salon*,

December 21, 1998. [http://www.salon.com/1998/12/21/straight\\_44/](http://www.salon.com/1998/12/21/straight_44/).

Singel, Ryan. "Google, Verizon Deny Net Fast-Lane Deal, but *Times* Says It's True." *Wired*,

August 5, 2010. <http://www.wired.com/2010/08/google-verizon-deny-deal/>.

Smith, Aaron. *Home Broadband 2010*. Washington, DC: Pew Research Center, 2010.

Wyatt, Edward, and Noam Cohen. "Comcast and Netflix Reach Deal on Service." *New York*

*Times*, February 23, 2014. <http://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html>.

Zickuhr, Kathryn, and Aaron Smith. *Home Broadband 2013*. Washington, DC: Pew Research Center, 2013.